IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

DARRYL ORRIN BAKER,

Plaintiff,

VS.

UNITED STATES OF AMERICA, GOVERNMENT OFFICIALS AT FCI-MCKEAN, WARDEN, OFFICER B. WESEMEN, MEDICAL DEPARTMENT

Defendants.

CIVIL ACTION NO. 05-147E

JUDGE MCLAUGHLIN

MAGISTRATE JUDGE SUSAN PARADISE BAXTER

CLERK U.S. DIST. COURT
JAN 30 P 2:22

PLAINTIFF'S OPPOSITION TO THE DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT, OR IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT

AND NOW, comes the Plaintiff, Darryl Orrin Baker (hereinafter "PLAINTIFF"), and proceeding **pro-se**, respectfully moves this Honorable Court to **grant** the Plaintiff's Opposition to the Defendant's Motion to Dismiss Plaintiff's Complaint, or in the Alternative, for Summary Judgment pursuant to Rule 12(b)(1),(2) and (6) and 56 of the Fed. R. Civ. P., because the Plaintiff has set forth facts to state a claim upon which relief can be granted, and the Plaintiff has also established subject matter jurisdiction.

PRO-SE LITIGANT

In **Alvarado v. Litshcer,** 267 F.3d 648 (7th Cir.2001), allegation of a prose complaint are held "to less stringent standards than formal pleading drafted by lawyers." **Haines v. Kerner,** 404 U.S. 519, 520, 92, S.Ct. 594, 30 L.Ed.2d 652 91972)(per curiam).

Accordingly pro-se complaints are liberally construed. See **Wilson v. Civil Town of Clayton, Ind.,** 839 F.2d 375, 378 (7th Cir.1988). In **McDowell v. Delaware States Police,** 88 F.3d (3rd Cir.1996); This Court stated we cannot affirm the dismissal unless we can " say with assurance that under the allegation of the pro-se complaint, which we hold to less stringent standards than formal pleadings drafted by lawyers, it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief". haines, 404 U.S. 519 Id. (quoting **Conley v. Gibson,** 355 U.S. 41, 45-56, 78 S.Ct. 99 102 L.Ed.2d 80 (1975)). see also, **Urrutia v. Harrisburg County Police Dept.,** 91 F.3d 451 (3rd Cir.1996); **Gibbs v. Roman,** 116 F.3d 83 (3rd Cir.1997).

JURISDICTION STANDARD OF REVIEW 12(b)(6)

This Honorable Court stated in **Evancho v. Fisher,** 423 F.3d 347 (3rd Cir.2005); that we have subject matter jurisdiction pursuant to 28 U.S.C. § 1291 (2000). Our standard of review of the district court's dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure is plenary. See **Gallo v. City of Philadelphia,** 161 F.3d 217, 221 (3rd Cir.1998). When considering a Rule 12(b)(6) motion, we are required to accept as true all allegations in the complaint and all reasonable inferences that can be drawn there from, and view them in the light most favorable to the plaintiff. **Rocks v. City of Philadelphia** 868 F.2d 644, 645

(3rd Cir.1989); **D.P. Enter, Inc. v. Bucks County Cmty. Coll.,** 725 F.2d 943, 944 (3rd Cir.1984). A Rule 12(b)(6) motion should be granted "if it appears to a certainty that no relief could be granted under any set of facts which couls be proved." D.P. Enter Inc., 725 F.2d at 944; **Richardson v. Pa.Dept of Health,** 561 F.2d 489, 492 93rd Cir.1977). However, a court need not credit either "bald assertion's" or "legal conclusions" in a complaint when deciding a motion to dismiss. **In re Burlington Coat Factory Sec. Litig.,** 114 F.3d 1410, 1429-30 (3rd Cir.1997)(quoting **Glassman v. ComputerVision Corp.,** 90 F.3d 617, 628 (1st Cir.1996)).

The Government request that this Honorable Court dismiss the Plaintiff's complaint pursuant to Rule 12(b)(6). See (Gov. Motion). The Plaintiff acknowledge, and will show this Honorable Court that Plaintiff has set forth facts that can be proved.

JURISDICTION AND STANDARD OF REVIEW 56(c)

In **Kay Berry, Inc. v. Taylor Gifts, Inc.,** 421 F.3d 199 (3rd Cir. 2005); this Honorable Court stated; the District Court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1228(a). This Court has jurisdiction pursuant 28 U.S.C. § 1291. We excercise plenary review over the District Court's grant of summary judgement and employ the same analysis required of the District Court to determine whether there are any issues of material fact that would enable the non-moving party to prevail. **Hamilton v. Leavy**, 117 F.3d 742, 746 (3rd Cir. 1997).

Summary judgment is appropriate when there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). At the summary judgment stage, we view all evidence and consider all reasonable inferences in a light most favorable to the non-moving party. **Anderson v. Liberty Lobby, Inc.**, 477 U.S. 242, 255, 106 S.Ct. 2505 91 L.Ed.2d 202 (1986). **Public Interest Research Group of New Jersey, Inc. v. Powell Duffryn Terminals. Inc.**, 913 F.3d 64, 76 (3rd Cir. 1990). "[W]e apply the same test as the district court should have used initially," id., at 76, to determine, if there are any remaining issues giving him the benefit of every favorable inference that can be drawn from the record. **Celotex Corp. v. Catrett,** 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986). **Reitz v. County of Bucks,** 125 F.3d 139 (3rd Cir.1997).

RULE 12(b)(1) FED. R. CIV. P. STANDARD

In **Cestonaro v. United States,** 211 F.3d 749 93rd Cir.2000); this Honorable Court stated; Giovanna Cestonaro filed a wrongful death action against the United States under the Federal Tort Claim Act, 28 U.S.C. §§ 1346(b), 2671, and the Virgin Islands Wrongful Death Statute, V.I.C. § 76. In her complaint, Mrs. Cestonaro alleged that "[d]efendant was negligent in failing to provide adequate lighting and correct the known dangerous condition and to warn others about the existence of the dangerous condition" at the hospital street lot. The United States filed a motion to dismiss under Fed. R.

Civ. P. 12(b)(1) asserting the District Court lacked subject matter jurisdiction because, the challenged National Park Service actions fell under the discretionary function exception to the FTCA's waiver of sovereign immunity. The District Court dismissed the complaint, finding the national Park Service's decisions concerning the hospital Street lot were grounded in its mission to "safeguard the natural and historic integrity of national parks" and in its policy " to minimally intrude upon the setting of such parks." Cestonaro, Civ. no. 1995-102, Slip. op. at 11. We have jurisdiction under 28 U.S.C. § 1291. We excercise plenary review over the applicability of the discretionary function exception. See **Gotha v. United States,** 115 F.3d 176, 179 (3rd Cir.1997) **Fisher Bros. Sales, Inc. v. United States,** 46 F.3d 279, 282 (3rd Cir.1995)(en banc). Because the government's challenged to the District Court's jurisdiction was a factual one under Fed. R. Civ. P. 12(b)(1), we are not confined to the allegations in the complaint (nor was the District court) and can look beyond the pleadings to decide factual matters relating to jurisdiction. See **Mortensen v. First Fed. Sav. & Loan Ass'n** 549 F.2d 884, 891 (3rd Cir.1977).

A. BIVENS

The Government request this Honorable Court to dismiss the Plaintiff's complaint pursuant to Bivens. The Government request is incorrect. The Plaintiff filed his complaint pursuant to FTCA, and has exhausted his Administrative Remedies, and the Plaintiff did not allege Bivens, so there was no need to exhaust purusant to PLRA.

B. FEDERAL TORT CLAIM ACT (FTCA)

The Plaintiff has exhausted under the Federal Tort Claim Act (FTCA), and the Government concedes that the Plaintiff has . Therefore, this Honorable Court has jurisdiction to entertain the Plaintiff complaint. See Government's Brief at 22.

BIVENS LEGAL ARGUMENT

The Government's Brief at 23 states:

> Defendant's Sherman and Wesemen should be dismissed from this lawsuit, because petitioner's failure to exhaust his administrative remedies is a procedural bar to the filing of a civil action regarding prison condition under the PLRA.

The Government misconstrues the Plaintiff as the ("petitioner") but for the sake of argument, it is the Plaintiff. The Plaintiff acknowledge that in his first complaint, the Plaintiff filed his action as a FTCA violation for negligence against the United States Government Officials. See Government's Brief at 22 acknowledging exhaustion. And see also, the Plaintiff's Second Amended Complaint. The statute states:

> An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury...caused by the negligent or wrongful act or omission of any employee of the Government unless the claimant shall have first presented the claim to the appropriate federal agency and his claim shall have been finally denied by the agency in writing the failure of an agency to make final disposition of a claim within six months after it is filed

> shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of his section.

See 28 U.S.C. § 2675(a)(emphasis added).

> This requirement extends to all suits, including those begun in State Court. [A]ny action... [removed from State Court under the FTCA] shall proceed in the same manner as any action against the United States... and shall be subject to the limitations and exceptions applicable to those action." 28 U.S.C. § 2675(d)(4).

The Plaintiff has not filed anything against any of the Government Officials that pertain to prison conditions. Therefore the Government contentions on this argument is misplaced.

The Government Brief at 25 states:

> Defendant Sherman, as a supervisory official, may not be held personally liable under the theory of respondeat superior.

This argument by the Government is also misplaced. The Plaintiff filed in his complaint that the Warden and the Assistant Warden where negligent concerning the Plaintiff's medical needs under the FTCA. The Plaintiff has shown throught documentation in the Plaintiff's Second Amended Complaint that the Warden James F. Sherman, was negligent to Plaintiff medical needs because he stated in his memorandum, that (" no other injuries were found concerning your left eye "), when the record clearly states that Plaintiff sustained an injury, and the Plaintiff acknowledged that while in SHU the Plaintiff brought this to the Warden and Assistant

and nothing was done. See **(attachment 1)** the Plaintiff ("COP OUTS"), that was sent to the Warden and the Medical Department. Also, the Plaintiff asserted negligence on these Defendant's for denying medical treatment to the Plaintiff pursuant to the FTCA, and not Bivens.

The Government's Brief at 27 states:

> Defendant's Wesemen and Sherman are entitled to dismissal on the basis of qualified immunity because the allegations of the complaint do not amount to the violation of a clearly established constitutional right.

The Government request that this Defendant's are entitled to Qualified Immunity pursuant to the Plaintiff's complaint. The Plaintiff complaint alleges negligence on the Defendant's Government Officials pursuant to FTCA, and the discretionary functional exception which the Plaintiff must overcome in order to establish a negligence violation. Therefore, Qualified Immunity is inapplicable in this action.

The Government's Brief at 31 and D states:

> Defendants Sherman and Wesemen should be dismissed from this lawsuit, because plaintiff has failed to allege his Eighth Amendment rights were violated.

Throughout the Government's Brief, the Government continues to allege that the Plaintiff has filed a complaint pursuant to Bivens, and the Eighth Amendment. The Plaintiff did not allege a Eighth Amendment violation for an assault. The Plaintiff alleged that

in his complaint and in the Plaintiff's Second Amended Complaint that the Medical Department owed Plaintiff duty of care and also that Officer Wesemen, and the Warden Sherman where negligent Pursuant to the FTCA, and not the Eighth Amendment. See Plaintiff's Complaint and Second Amended Complaint. So the Plaintiff did raise negligence, but not under the Eighth Amendment, but under the FTCA. Therefore, the Government misconstrues the the Plaintiff's complaint, because no where in the Plaintiff's complaint has the Plaintiff asserted a Eighth Amendment violation when Plaintiff filed all Cause of Action Pursuant to the FTCA, and the Plaintiff request that this Honorable Court deny the Government's invitation on this argument.

The Government contends that, this Honorable Court should dimiss the Plaintiff's complaint because.

> The failure to protect allegation should be dismissed for lack of subject matter jurisdiction because the United States has not waived sovereign immunity in matter involving the discretionary function of Government Actors.

Before, the Plaintiff dives off into this argument by the Government the Plaintiff will cite this Circuits and the Supreme courts standard to the Discretionary Function Exception. This Honorable Court stated in **Gotha v. United States,** 115 F.3d 176 (3rd Cir.1997); The Federal Torts Claims Act is a partial abrogation of the

federal government's sovereign immunity that permits suits for torts against the United States. The Act, however, imposes a significant limitation by providing that no liability may be asserted for a claim "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C § 2680(a). The statute does not define "discretionary function or duty" and these terms have led to extensive litigation over the scope of the government's liability to tort claimants. It is clear that if the word "discretionary" is given a broad construction, it could almost completely nullify the goal of the Act. **United State v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines),** 467 U.S. 797, 808 104 S.Ct. 2755, 2762, 81 L.Ed.2d 660 (1984) (exception "marks the boundary between Congress Willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals"). The statutory language does not apply to every situation in which there is an actual option to choose between courses of action or inaction. Rather, as the Supreme Court has stated, the discretion that is immunized from "second-guessing" in the tort suit context applies to "legislative and administrative decisions grounded in social, economic, and political policy." Id. at 814, 104 S.Ct. at 2765. In **Berkovitz v. United States,** 486 U.S. 531, 537, 108 S.Ct. 1954 1959, 100 L.Ed.2d 531 (1988), the Court explained: "The exception properly construed...protects only governmental actions and decisions based on consideration of public policy." The reason for "fashioning

an exception for discretionary governmental functions" was to "protect the government from liability that would seriously handicap efficient government operations." Varig Airlines, 467 U.S. at 814, 104 S.Ct. at 2765. In Berkovitz, the Court adopted a two-stage inquiry: First, a court must consider if "a federal statute, regulation or policy specifically prescribes a courts of action for an employee to follow." 486 U.S. at 536, 108 S.Ct. at 1958. If so, "the employee has no rightful option but to adhere to the directive." Id. Consequently, there can be no lawful discretionary act. If circumstances imposing complusion do not exist, a court must then consider whether the challenged action or inaction "is of the kind that the discretionary function exception was designed to shield." Berkovitz, 486 U.S. at 536, 108 S.Ct. at 1959. Again, the Court emphasized that the "Discretionary function exception insulates the Government from liability if the action...involves the permissible exercise of policy judgment." Id. at 537, 108 S.Ct. at 1959. In **United States v. Gaubert,** 499 U.S. 315, 325, 111 S.Ct. 1267, 1275, 113 L.Ed.2d 335 (1991), the Court explained that for a plaintiff's claim to survive, the challenged actions cannot be grounded in the policy of the regulatory regime." The Court stressed that the "focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred by statute or regulations, but on the nature of the actions taken and on whether they are susceptible to policy analysis."" Id. Gaubert noted another limitation on the exception, citing the hypothetical situation where an agency

employee negligently drives an automobile in the course of his employment. Such action, although within the scope of employment, "cannot be said to be based on the purposed that the regulatory regime seeks to accomplish." 499 U.S. at 325 n. 7, 111 S.Ct. at 1275 n. 7. An examination of some of the situations where the discretionary function exception was applied may be helpful in understanding its scope. A federal agency decision to use a spot-checking process in inspecting aircraft was an exercise of policy discretion. Varig Airlines, 467 U.S. at 814-16, 104 S.Ct. at 2764-66. The supervision of day-to-day activities of a failing thrift institution was based on the public policy considerations of protecting the federal savings and loan insurance fund and federal oversight of the thrift industry. Gaubert, 499 U.S. at 332, 111 S.Ct. at 1278-79. The decision of the Food and Drug Administration to refuse entry to suspected contaminated fruit was a discretionary action. Fisher Bros., 46 F.3d at 285. See also **Sea-Lan Serv. V. United States,** 919 F.2d 888 (3rd Cir.1990)(decision to use asbestos in construction of ships was a discretionary decision); **General Public Utils. Corp. v. United States,** 745 F.2d 239 (3d Cir.1984)(action of Nuclear Regulatory commission in not reporting safety information was discretionary).

The Government's Brief states at 33-34 that the Plaintiff:

> Specifically, he contends that the United States failed to take reasonable measures to protect inmates, because the staff member assigned to the inmate either did not prevent the assault or failed to stop the fight promptly. Thus, Plaintiff seems to posit two arguments. (1) FCI Mckean failed to post sufficient staff in the housing units and, (2) staff at FCI Mckean failed to seperate him form assailants prior to the assault.

The Government's Brief states that Plaintiff raised (2) issues, this is incorrect. The Plaintiff asserted that Officer Wesemen was negligent for leaving the unit unmonitored and that, Officer Wesemen and Warden Sherman was not shielded by the discretionary function exception because there was no policy or regulation to shield the, from immunity. The question is, did Officer Wesemen, and the Warden use judgment or choice when Officer Wesemen, left the unit unmonitored, as is stated by the Supreme Court in **Berkovitz v. United States,** 486 U.S. 531, 537, 108 S.Ct. 1954, 1959, 100 L.Ed.2d 531 (1988), and the **United States v. Gaubert,** 499 U.S. 315, 325, 111 S.Ct. 1267, 1275, 113 L.Ed.2d 335 (1991).

The Government's Brief at 39, states that the Warden James Sherman submitted an Declaration stating the procedures for Government Officials to follow. Government's Brief at 39 states:

> 18 U.S.C. § 4042 vests the BOP with the general duty to protect inmates in its custody. There is not statute or regulation requiring prisons to post officers in each inmate room or in common areas within each housing unit. Nor is there a statute or regulation requiring specific

> inmate housing assignments. At FCI Mckean, during the time in question, one correctional officer was assigned to each side of an inmate housing unit. Each side of a housing unit holds approximately 150-160 inmates. See Document 6, Declaration of James F. Sherman.
>
> The correctional officer assigned to Plaintiff's side of the housing unit was responsible for monitoring that side of the housing unit and for supervising all inmates assigned to that unit. Among the monitoring and supervision duties was the requirement that the officer assigned to Plaintiff's side of the housing unit supervis all movement into the housing unit during the final institutional movement. See Document 6.

The Government states that the Warden Sherman's Declaration states that (" supervise inmate movement into the housing unit during the final institutional movement "). There is **no** statement in the Wardens Declaration stating the above statement by the Government, and this statement cannot be trusted. The Wardens Declaration states at 2 and 5:

> In February 2004, it was my determination, based upon staffing levels, professional experience, and institutional needs, that one correctional officer would be posted on each side of each housing unit. This unit officer would be responsible for supervising the inmates **inside** the housing unit by making frequent rounds through all areas of the housing unit, conducting safety and sanitation inspections, distributing cleaning supplies, passes out mail, and conducting cell searches and pat searches of inmates **inside** the housing unit.

There is nothing in the Wardens Declaration to state what the Government alleged in it's brief. Therefore, this statement is fabricated by the Government and cannot be trusted.

The record show that the Warden concedes that there is no regulation or policy. Therefore, the Government is not shielded by the discretionary functional exception and jurisdiction is established. See Berkovitz, and Gaubert. Secondly, did the Warden and Officer Wesemen use judgment of choice. The record show that the Plaintiff raised in his complaint that Officer Wesemen was not in the unit when the Plaintiff was assaulted by the Latin King Gang Member's. In fact, the Government's Brief provides an Declaration from Officer Brain Weseman, which states at 40:

> Because FCI Mckean assigned one correctional Officer to each side of each inmate housing Unit, and because FCI Mckean require each housing Officer to supervise inmate ingress during final inmate movement at 8:30 p.m. each night, it was a discretionary matter left to the Warden and Unit Officer to determine the priority of duties within the housing Unit at at a given time.

The Government states that (" and because FCI Mckean required each housing Officer to supervise inmate ingress during final inmate movement at 8:30 p.m. each night "); The Warden's Declaration does not state that. See Warden's Declaration. The Warden's Declaration states that (" all conduct by Officers are done **inside** the housing unit not outside. Officer Brain Weseman Declaration states at 4 that:

> On February 27, 2004, at approximately 8:15 p.m. **I was standing outside of the entrance to Unit A,**

Officer Brain Weseman, concedes that he was not in the housing Unit when the Plaintiff was assaulted by the Latin king Gang Member's, and this issue was raised in the Plaintiff Complaint and also in Plaintiff's Second Amended Complaint. There is nothing in the Warden's Declaration that states Officer's are to stand outside of the Unit to monitor it. The Warden states that all officer's conduct is to be done in the **inside** the housing unit not outside. Therefore, Officer Brain Weseman, and the Warden did not use judgment or choice by the Officer leaving the unit unmonitored and unprotected. See Government's Brief, and also **(attachment 2)**

The Government's Brief states at 42:

> Alternatively, punitive damage are barred under the FTCA.

The Government request that this Honorable Court should deny punitive damages because the Plaintiff requested this in his complaint, but the Plaintiff also requested:

(1) medical negligence under FTCA
(2) compensatory damages
(3) federal agency claim

See Plaintiff's Second Amended Complaint, and **(attachment 3)**
The Federal Tort Claim Act states:

> Passed in 1946, the FTCA offers a limited waiver

> of the federal government's sovereign immunity as to negligent acts of government employees acting within the scope of their employment. It provides that "[t]he United States shall be liable...in the same manner and to the same extent as a private individual under like circumstances. [...]" 28 U.S.C. § 2674. In proper circumstances, prisoner such as the appellant here may invoke the FTCA to seek damages for injuries received while in confinement. **United States v. Muniz**, 374 U.S. 150, 153, 83 S.Ct. 1850, 10 L.Ed.2d 805 (1963).

Therefore, if this Honorable Court agrees with this invitation by the Government, the Plaintiff request relief under the FTCA for damages.

The Government Brief states that the Government has not waived sovereign immunity. See Gov. Brief at 43:

> The individual Defendant's should be dismissed from this Civil Action, because United States Employees in their Official Capacities have not waived sovereign immunity from suit under Federal Tort Claims Act.

The Plaintiff is aware that, in **Gotha v. United States ,** 115 F.3d 176 (3rd Cir.1997); this honorable Court stated; the Federal Tort Claims Act is a partial abrogation of the federal government's sovereign immunity that permits suits for torts against the United States. The Act, however, imposes a significant limitation by providing that no liability may be asserted for a claim "based upon the excercise or performance or the failure to excercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused. " 28 U.S.C. § 2680(a).

From the above reading the Plaintiff must show this Honorable Court that, in order for sovereign immunity to be waived the Defendant';s failed to excercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government. The Plaintiff acknowledge and the facts show that the Defendant Officer Weseman was not in the Unit at the time of the assault took place. In fact, in **Palay v. United States,** 349 F.3d 418 (7th Cir.2003); which cites **Coulthurst, v. United States,** 214, F.3d 106 (2nd Cir.2000); and states, as in Coulthurst, it is easy to imagine a scenario in which MCC Officials behaved in a negligent fashion, but without making the types of discretionary judgments that the statutory exception was intended to exempt from liability. Perhaps the corrections officer monitoring the holder over unit at the time that the gang altercatioin broke out was simply asleep, for example. **Or perhaps he left the unit unattended in order to injoy a cigarette or a snack. This type of carelessness would not be covered by the discretionary function exception, as it involves no element of choice or judgment grounded in public policy consideration.**

The record show in the Warden's Declaration that the Officer's ||" would be responsible for supervising the inmates inside the housing unit, conducting safety and sanitation inspections, distributing cleaning supplies, passes out mail, and conducting cell searches and pat searches of inmates inside the housing unit "). No where in this Declaration does it states that Officers are to be outside

the unit. see **(attachment 2)**; Also, the Declaration by Officer Weseman, states at 4: (" On February 27, 2004 at approximately 8:15 p.m., I was standing outside of the entrance of Unit A "). see **(attachment 2)**; By the Warden's Declaration stating that all conduct of Officer's are to be conducted inside the Unit, and Officer Weseman, conceding in his Declaration that he was not in the Unit, sovereign immunity is waived in this complaint.

The Government's Brief at 44 states:

> Plaintiff failed to establish that staff at FCI Mckean failed to protect him from danger, because the act of his assailants was an unforeseeable intervening and superceding act.

The Plaintiff alleged in the Plaintiff complaint that 4042 was violated. The Plaintiff is aware that in **Cohen v. United States,** 151 F.3d 1338 (11th Cir.1998), that 18 U.S.C. § 4042 states:

> 18 U.S.C. § 4042, which provides in relevant part that "[t]he Bureau of Prisons, under the direction of the Attorney General, shall...provide for the safekeeping, care, and protection of all person charged with or convicted of offenses against the United States.

The Plaintiff is aware that § 4042 does not give direction for the BOP to follow, and is discretionary. But, the record show that the Warden's Declaration gave the Officers at FCI Mckean specific instructions to follow and Officer Weseman did not follow those

instruction. By leaving the unit unattended, because the Wardens Declaration states all Officer's are to perform duties inside the housing units and not outside, there is no where in the Wardens Declaration is the words "outside the unit". Therefore, this regulation by the Warden is non-discretionary because Officer Weseman did not follow it. See **United States v. Gaubert,** 499 U.S. 315, 322, 111 S.Ct. 1267, 1273, 113 L.Ed.2d 335 (1991), **Berkovitz v. United States,** 486 U.S. 531, 536, 108 s.Ct. 1954, 1958, 100 L.Ed.2d 531 (1988). The record show that the Plaintiff alleged that Officer Weseman was not in the unit at the time of the assault, and the record is substantiated by Officer Weseman Declaration where he states at 4:

> On February 27, 2004 at approximately 8:15 p.m. I was standing outside of the entrance to Unit A, monitoring inmates returning to the unit during the last controlled inmate movement of the day in preparation for the 9:00p.m. count. During, the last inmate controlled movement, inmates are permitted to return from places outside of the housing unit, including, but not limited to, the recreation areas the education department, the law library, psychology services, or religious services, in order to be present in their cells for 9:00 p.m. count. During this controlled movement, I would stand outside the entrance of Unit A, and conduct random checks of inmate indentification cards and pat searches of inmates entering the housing unit.

Officer Weseman, concedes that he was standing outside of the housing unit and not inside as Warden Smith instructed the Officer's to do. Therefore, this violation of the Warden regulation is non-discretionary and is not protected, and free's the Government of it's sovereign immunity, and can be sued under the Federal Tort Claims Act.

The Government's Brief at 49, states that the Plaintiff was not subjected to Medical malpractice. This protestation by the Government is incorrect. The record show from the Orbital Specialist and Plastic Surgeon that,the Plaintiff has a fracture of the orbital floor with entrapment. The Plaintiff is now (11) months out, and still has not been treated. The Plaintiff's left eye is still causing the Plaintiff pain, and the Plaintiff's left eye is still off-centered. The Plaintiff's left eye will not go up without causing som discomfort, and the entrapment has not been released. The record show that surgery was needed to correct this problem and the staff at FCI Mckean' was negligent for postponing and delaying the Plaintiff's treatment when the Plaintiff was complaining of pain and, that the Plaintiff left eye would not go up as far as the right, show that the medical Department was the proximate cause of the Plaintiff injuries. The record show that the Physician Assistant (PA) did not do a eye examination or prescribe one for the Plaintiff to see a eye specialist. The PA, did not know that the Plaintiff left eye was not going up as far as the right eye and was off-centered, after the Plaintiff told him that it wouldn't.

The Government's Brief states at 51 that:

> It was noted that Plaintiff's vision was 20/25 in <u>both eyes</u>. Id. There is no indication Plaintiff reported double vision and blurred vision. Id. The Physical examination did not indicate Plaintiff's left eye was off-centered. Id.

Theses statement by the Government is contradicted by the record of the Orbital Specialist and Plastic Surgeon.

The Government's Brief at 50 states:

> The evidence shows that plaintiff reported to the PA left face and eye pain secondary to an assault by two inmates.

From these statements in the Government's brief,they are contradicted and cannot be trusted. The above statements by the Government would indicate that the negligence by the medical department for the PA not knowing and checking the Plaintiff left eye or both eyes after the Plaintiff told the PA that the left eye was causing the Plaintiff pain shows that the medical department was the proximate cause of the Plaintiff's injuries.

If this Honorable Court would examine the Documents 2b and 2c this Honorable Court will agree that the statements above are not substantiated by record and are fabricated by the Government, and therefore cannot be trusted, because the PA has not made any statements from the document's the Government cites in it's brief. See **(attachment 3)**

The Government states that the Plaintiff while in special Housing Unit did not report any medical issues. This is incorrect, because the record show that while in (SHU) the Plaintiff was complaining regularly. The Government states at 51.

> The evidence reveals medical staff made rounds through the special housing unit (SHU) twice each day; however Plaintiff did not report any medical issues to staff during these rounds.

These statements are also fabricated by the Government because when the Plaintiff was in SHU on February 29, 2004, the Plaintiff complained regularly. See **(attachment 1)**; The Government states, that the plaintiff stated that the injury the Plaintiff sustained cleared up. The Plaintiff continued even until this day. The record show that the Plaintiff complained about the left eye injury the Plaintiff sustained all the way up until the Plaintiff release and did not get no results and did not see a eye doctor while in SHU. See **(attachment 1)**

CONCLUSION

The Plaintiff request that this Honorable Court dismiss the Government's Memorandum of law in Support of Defendant's Motion to Dismiss or in the Alternative, Motion for Summary Judgment, because the Plaintiff has set forth facts that the United States Government officials where negligent and where the proximate cause of the plaintiff's injury, and that a non-discretionary standard apply to the Plaintiff's Complaint.

Therefore, the Plaintiff request that this Honorable Court deny the Motion for Summary Judgment because is a material fact that the Plaintiff has shown and also, this Court has subject matter jurisdiction because the Plaintiff has proved through facts that a non-discretionary standard applies to this Complaint.

Respectfully submitted

BY: Darryl Baker

Darryl Orrin Baker
(PRO-SE)
Reg. No.# 19613-039
Federal Prison Camp
P.O. Box 2000
Lewisburg, PA
17837

EXECUTED: JANUARY 23**, 2006**

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the within Plaintiff's Opposition to the Defendant's Motion to Dismiss Plaintiff's Complaint, or in the Alternative, for Summary Judgment was served postage-paid United States mail on this day 23, January, 2006 to and upon the following:

Paul E. Skirtich
Assistant United States Attorney
Western District of Pennsylvania
700 Grant Street, Suite 4000
Pittsburgh, PA. 15219

Respectfully submitted

BY: Darryl Baker

Darryl Orrin Baker
(PRO-SE)
Reg. No.# 19613-039
Federal Prison Camp
P.O. Box 2000
Lewisburg, PA
17837

EXECUTED: JANUARY 23, 2006

January 23, 2006

Clerk of the Court
Honorable Judge Mclaughlin
Susan Paradise Baxter
Chief United States Magistrate Judge
United States District Court
Western District of Pennsylvania
17 South Park Row, Room A280
Erie, PA 16501

RE: CIVIL ACTION NO. 05-147E

Dear Clerk of the Court :

Please find inside Plaintiff's Opposition to the Defendant's Motion to Dismiss Plaintiff's Complaint, or in the Alternative, for Summary Judgment.

The Plaintiff acknowledge that the Plaintiff has sent the same to the Assistant United States Attorney Paul E. Skitich Western District of Pennsylvania U.S. Post Office Courthouse 700 Grant Street, Suite 4000 Pittsburgh, Pennsylvania 15219.

Respectfully submitted

BY: Darryl Baker

Darryl Orran Baker
Reg. No.# 19613-039
Federal Prison Camp
P.O. Box 2000
Lewisburg, Pa.
17837

encl:
cc: AUSA PAUL E. SKIRTICH